IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1644

NORMAN K. JONES

Apellant

v.

THE PENNSYLVANIA MINORITY BUSINESS DEVELOPMENT AUTHORITY; ISABELLE SMITH; EUGENE HESS

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
District Judge: The Honorable Jay C. Waldeman
D.C. Civil No. 97-cv-04486

Argued: April 27, 2000
Before: BECKER, Chief Judge, BARRY, and BRIGHT,* Circuit Judges

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JUDGEMENT

This cause came to be heard on the record from the United States District Court for Eastern District of Pennsylvania and was argued on April 27, 2000.

After consideration of all contentions raised by the appellant, it is ADJUDGED and ORDERED that the judgment of the District Court be and is hereby affirmed.

Costs are taxed against appellant.

Marcia M. Waldron, Acting Clerk

Dated: July 28, 2000

UNREPORTED/NOT PROCEDURAL
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Argued: April 27, 2000
Before: The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, Sitting by Designation

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MEMORANDUM OPINION OF THE COURT

BARRY, Circuit Judge:

Appellant Norman K. Jones appeals the District Court's grant of summary judgment on his claim of discrimination under Title II of the Americans with Disability Act ("ADA") against the Pennsylvania Minority Business Development Authority ("PMBDA"), Isabelle Smith and Eugene Hess. We exercise appellant jurisdiction pursuant to 28 U.S.C. § 1291. After reviewing the extensive record in this case, we are satisfied that the District

Court correctly granted summary judgment and, accordingly, we will affirm.

I.

The parties are eminently familiar with the facts of the case. As a result, we provide only a brief summary of those facts at the outset and will incorporate additional facts as they are relevant to our discussion of the issues.

On April 24, 1995, Jones, as the president and sole shareholder of Street Sounds Recording and Production, Co., Inc. ("Street Sounds"), applied to the PMBDA for a $60,000 business loan. The application was initially reviewed and processed by Kelbin Carolina, then the PMBDA regional representative for Philadelphia. Later in the process, the application was handled by Eugene Hess, a PMBDA economic development analyst. At all times, Isabelle Smith was the PMBDA executive director.

In his application, Jones indicated that Street Sounds "was forced to inactivate in 1992 & 1993 due to a secondary job related injury . . . [he sustained] at the U.S. Postal Service." App. At 5304. In a subsequent letter to Carolina, Jones explained that he was "permanently disabled" from his "normal occupation (postal worker) and will continue to receive monthly disability compensation indefinitely or" until he is no longer considered disabled, which he stated was "not a possibility." Id. At 5501. Jones claimed that he suffered from generalized anxiety disorder.

Smith was concerned about the extent of Jones's disability and whether it would prevent him from running the business for which he was seeking the loan. Carolina, however, told her that Jones's disability would not present a problem and it appears that the issue was, for the most part, dropped.

On July 13, 1995, Jones's loan application was presented to the Loan Evaluation Committee, which recommended to the Board of Directors that the loan be approved. The Board accepted the recommendation and approved the loan on July 27, 1995.

A commitment letter was then sent to Jones, listing the conditions he was required to meet before the loan could

close. See id. At 5532-38. As pertinent to this appeal, the following conditions were required:

> 1. Borrower shall establish at or prior to closing an escrow account at a bank acceptable to PMBDA for deposit of PMBDA funds. Escrow funds shall include Borrower's capital contribution.
>
> 2. PMBDA will require as security for this Loan: a. a second mortgage on certain real property located at 6013 Magnolia Street, Philadelphia, Pennsylvania 19144, subject only to that certain mortgage in the principal amount of $17,800 . . . .[and] b. a second mortgage on certain real property located at 450 East Walnut Lane, Philadelphia, PA 19144, subject only to that certain mortgage in the principal of $55,000 or less. Borrower shall make a capital contribution to the Project at closing in the amount of Twenty Thousand Dollars ($20,000). The Borrower shall provide proof of equity injection into the Project in the amount of $20,000, prior to losing of the PMBDA Loan.

Id. At 5532-37. The commitment letter also stated that the loan proceeds were to be used strictly for video production ($20,500), and audio and video promotion ($39,500). See id. At 5538. Thus, none of the proceeds was designated as unrestricted working capital.

A closing date was scheduled for April 3, 1996. Although the parties met on that day, the closing did not occur. The reasons for the failure appear to be two-fold. First, as Jones concedes, "[b]y the time of closing [he] had still been unable to receive back mortgage waivers on both of the properties he pledged as collateral." Appellant's Br. at 13. Second, Jones and Abayomi Osumipedi, PMBDA's escrow agent, were unable to open an escrow account at the

designated bank because the bank refused to sign PMBDA's anti-discrimination clause.

On April 3rd, Jones also informed PMBDA that he wanted to change the terms of the loan agreement. He asked to use $20,000 of the loan proceeds as unrestricted working capital. In addition, he requested a credit toward satisfaction of the equity injection for all prior business expenditures made on behalf of Street Sounds.

PMBDA partially agreed. It granted Jones permission to use $10,000 of the loan as unrestricted working capital. Furthermore, it allowed him to take a credit for prior business expenditures, but only for those made after July 1, 1995, and provided that the proper receipts were submitted. Upon learning of the approval of only $10,000 as unrestricted working capital, Jones informed PMBDA that he needed the whole loan as working capital because Street Sounds was currently non-operational. See App. at 344.

PMBDA began to question Jones's ability to satisfy the requirements of the commitment letter and, ultimately, to repay the loan. It informed Jones of its concerns on April 26, 1996:

> 1. It has come to the attention of the Authority that a second mortgage as described in item 6a [i.e., the property located at 6013 Magnolia Street] may be unattainable. Please explain why this property is unavailable for use as collateral and what collateral and what collateral of equal value will be substituted.
>
> 2. It is the understanding of the Authority that the $20,000 required at the time of closing . . . was not provided either in cash or in receipts for purchases pertaining to the business dated from July 1, 1995 or thereafter.

> 3. You indicated [in a conversation with Mr. Hess] that the business has not been in operation for approximately a year. At the July 13, 1995 [LEC] meeting, the members of the Committee were under the impression that the business was an ongoing concern . . . .

An explanation of your business operations is needed.
Id. At 74.

Jones attempted to satisfy the requirements of the commitment letter by, among other things, submitting numerous receipts and canceled checks intended to show business expenditures on the part of Street Sounds. He also purchased a new property at 6009 Magnolia Street to be used as collateral in lien of 6013 Magnolia Street.

PMBDA, however, was not convinced. It remained concerning for several reasons: (1) the canceled checks submitted by Jones as business expenditures only added up to about $11,000; (2) Street Sounds's tax returns were prepared on a modified cash basis, making it difficult to determine changes to accounts such as paid-in-capital; (3) 6009 Magnolia was appraised at $42,000, yet Jones only paid $15,000 for the property; (4) it was not clear whether the property at 6009 Magnolia would be used for the business; and (5) it was not clear whether Jones was still using his disability payments to keep Street Sounds operating. See id. At 5144. In addition, PMBDA rejected Jones's request for a credit totaling 11,731 for business equipment that he purportedly sold to Street Sounds. Although Jones contended that he sold the equipment to Street Sounds on December 18, 1995, it was discovered that Street Sounds owned the equipment as far back as 1991.

On September 26, 1996, despite Jones's insistence that he could satisfy the requirements of the commitment letter, the PMBDA Board voted to rescind the loan. Following the rescission, Jones filed the present action in the United States District Court for the Eastern District of Pennsylvania, alleging that PMBDA and its officers rescinded the loan on account of his disability.

II.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services . . . provided by a public entity." Id. § 12131(2).

A plaintiff establishes a prima facie case of disability under the ADA by showing: (1) that he or she has a disability; (2) that he or she is otherwise qualified; and (3) that he or she has suffered an adverse decision as a result of discrimination. See Shaner v. Synthes, 200 F.3d 494, 500 (3d Cir. 2000). It is the plaintiff's burden to establish that he or she is otherwise qualified to receive the benefits he or she was denied. See Walton v. Mental Health Ass'n of S.E. PA. 168 F. 3d 661, 670 (3d Cir. 1999). If the plaintiff satisfies this initial burden, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the denial. See id. At 668. Finally, if the defendant articulates a legitimate, nondiscriminatory reason, the plaintiff can defeat summary judgment only by "[p]ointing to some evidence, direct or circumstantial, from which a fact finder could reasonably either (1) disbelieve the employer's

articulated legitimate reasons; or (2) believe than an invidious discriminatory reason was more likely than not a motivating or determinative cause of the [defendant's] action." Id. (quoting Lawrence v. National Westminister Bank N.J., 98 F. 3d 61, 66 (3d Cir. 1996).

The District Court found that Jones was an individual with a disability for purposes of the ADA and appellees do not vigorously contest this issue. A review of the record shows that Jones's evidence of disability is, at best, questionable. Nonetheless, given our ultimate disposition of the claim, we will assume, for the limited purpose of this appeal, that Jones has a disability within the ambit of the ADA.

The pertinent issue in this case is whether Jones is a "qualified individual." The District Court determined that Jones was not qualified because he failed to meet the eligibility requirements set forth in the commitment letter. First, the Court stated that "i]t is uncontroverted that the scheduled closing fell through because plaintiff had not obtained the mortgage waivers." The Court noted that it was understandable for PMBDA to have rejected the substituted collateral, i.e., 6009 Magnolia Street, because "[a]ny prudent lender would be skeptical about a claim that one had sold his property . . . for $22,000 less than and barely 40% of the market price." Second, the Court noted that Jones failed to satisfy the $20,000 equity injection. The Court pointed out that Jones attempted to use "a purported transfer of $11,731 worth of equipment from [himself] . . . to Sound Streets for which plaintiff did not have dated receipts or comparable evidence of market value." The Court also rejected Jones's argument that he had presented proof of his ability to make a cash injection. The Court explained that "[w]ith his statement of September 24, 1996 that a cash injection [was]

still possible, plaintiff provided no supporting evidence or explanation of when or how such an injection be made.

We agree with the District Court that Jones failed to meet the requirements set forth in the commitment letter and, consequently, did not qualify for the PMBDA loan. The evidence indicates that Jones as not able to obtain mortgage waivers on the properties he pledged as collateral at the time of the scheduling closing and Jones concedes as much. Although he argues that he attempted to substitute the original collateral with the property at 6009 Magnolia, as the District Court pointed out, the value of that property was highly suspect. In addition, Jones did not present evidence to support his contention that he could, in fact, meet the required equity injection. Many of the bank statements Jones submitted are dated later than the loan rescission and, therefore, were not relevant to PMBDA's decision to rescind the loan. Further more the $11,731 in business expenditures which Jones submitted as part of the equity injection requirement was rejected by PMBDA as a "sham" transaction - a characterization firmly supported by the record. Ultimately, it was Jones's burden to establish that was qualified to receive the benefit, i.e., that he satisfied the loan requirements. He failed to do so.

We reject Jones's contention that the collateral and equity injection requirements were not "essential" to receiving the PMBDA loan. Jones submits that PMBDA "approved loans with hundreds of thousands of dollars in collateral deficiency and did not even regard [his] collateral deficiency as substantial." Carolina explained in hid deposition testimony, however, that some loans were indeed approved without collateral, but only where the borrower's "total assets exceeded the loan amount." Jones provided no evidence which would indicate that this was his situation. Furthermore, Jones's reliance on an audit report indicating that loans were made with collateral deficiencies is

misguided. PMBDA had been threatened with termination because of its poor default rate and, as the District Court opined, "it is nonsensical to suggest that PMBDA was obliged to continue to engage in the kind of conduct which jeopardized its funding and resulted in the highly critical audit report."

Jones argues, nonetheless, that there was direct and circumstantial evidence of discrimination on the part of PMBDA and its officers. In support, he points to several occasions on which Smith questioned whether Jones's disability would present a problem.

With two exceptions, however, there inquiries all occurred before July of 1995 and, hence, prior to PMBDA's approval of Jones's loan application. There is, therefore, no "link" between these allegedly discriminatory remarks and the adverse decision, i.e., the loan rescission, which occurred over a year later. See Bailey v. Amsted Indus., Inc., 172 F. 3d 1041, 1045 (8th Cir. 1999) ("[Plaintiff] failed to establish a prima facie case of discrimination [under the ADA] because he failed to show that his discharge occurred under circumstances that raise an inference of unlawful discrimination."); see also Greer v. Emerson Elec. Co., 185 F.3d 917, (8th Cir. 1999)(no prima facie case of discrimination under the ADA "because the record contains no evidence from which to reasonably infer that [her] discharge was on account of an actual or perceived disability.")

Moreover, although PMBDA was obviously aware of Jones's disability at the time it rescinded the loan - indeed, he had told PMBDA of his disability when he applied for the loan - that awareness, alone, does not establish that the disability was the basis for the rescission. See Kelly v. Drexel Univ., 94 F. 3d 102, 108 (3d Cir. 1996) ("[W]e hold that the mere fact that an employer is aware of an employee's

impairment is insufficient to demonstrate either that the employer regarding the employee as disabled or that that perception caused the adverse employment action.").

The two statements made after the loan was approved, which Jones contends evidence that his disability was the basis for the rescission, are equally unconvincing. The first is an e-mail which Ms. Smith sent to Emily White on April 23, 1996:

> "Gene [Hess] spoke to Abayomi [Osumipedi] and this client did not have the $20,000 equity injection as per the loan documents. This entire situation is suspect. In the LEC meeting last year this client indicated that this business was in operation. Karen and I both questioned the client because he had been receiving disability from a work related injury. PMBDA will send a letter to the client to have a meeting to discuss this matter and possibly with for May. Can we refuse to disburse a loan when there is adverse information? Kelbin was the Rep on this deal and there could not have been proof of the equity injection prior to coming to the LEC if these types of problems are now coming to light." App. at 775. The second is found in Ms. Smith's deposition testimony in which she responded to the question "[d]id you discuss the issue of disability with Eugene Hess [at the time you drafted the resolution for rescission of the loan] "by stating: "I may have, in regards to whether his disability payments were continuing, if he still had a source of income, because the source of income was not on his tax statements."

App. At 564. These isolated references to Jones's disability, however, are consistent with PMBDA's overall concern with Jones's ability to satisfy the loan requirements and repay the loan. As the District Court explained: "Plaintiff himself

informed defendants of his disability and stated it was the reason his business had been inactive in the past. Ms. Smith and any others asked to approve plaintiff' loan application had a legitimate interest in determining whether plaintiff's disability would prevent him from managing and working full-time in the future at Street Sounds as required by PMBDA regulations." The few times that Jones's disability was mentioned in connection with his loan application, therefore, do not support his contention that he suffered an "adverse . . . decision as a result of discrimination." Gaul v. Lucent Techs, Inc., 134 F. 3d 576, 580 (3d Cir. 1998). In sum, although many questions arose during the entire loan approval process regarding Jones's ability to repay the loan and the risks involved in granting him the loan, there is no evidence that any of them implicated his disability in order than a wholly nondiscriminatory manner.

III.

In conclusion, we are persuaded that Jones has failed to establish a prima facie case of disability-based discrimination under the ADA. Despite Jones's contentions to the contrary, the record indicates that it was his failure to satisfy the loan requirements, and not his disability, that ultimately resulted in the rescission of his loan. Thus, we find that "there exists no genuine issue of material fact that would permit a reasonable jury to find" that the rescission of the loan was the "result of discrimination." International Union, United Auto, Aerospace & Agric. Implement Workers of America v. Skinner Engine Co., 188 F. 3d 130, 137 (3d Cir. 1999) quoting Miller v. Indiana Hosp., 843 F. 2d 139, 143 (3d Cir. 1988). Accordingly, we will affirm the judgment of the District Court.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

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Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORMAN K. JONES	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE PENNSYLVANIA MINORITY BUSINESS DEVELOPMENT AUTHORITY, ISABELLE SMITH and EUGENE HESS	:	**NO. 97-4486**

ORDER

AND NOW, this day of , consistent with the accompanying memorandum, IT IS HEREBY ORDERED that plaintiff's Motion for Summary Judgment is DENIED; defendants' Motion for Summary Judgment is GRANTED; and, accordingly JUDGMENT is ENTERED in the above action for the defendants

BY THE COURT:

_____

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORMAN K. JONES	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE PENNSYLVANIA MINORITY BUSINESS DEVELOPMENT AUTHORITY, ISABELLE SMITH and EUGENE HESS	:	**NO. 97-4486**

MEMORANDUM

I. Background

Plaintiff has asserted claims under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12133, and the Rehabilitation Act of 1073, 28 U.S.C. § 294(a). He alleges that defendants denied him a loan because he is disabled. He seeks "compensatory and punitive damages" for "physical and emotional injury," "mental anguish" and "economic injury."

Presently before the court are the parties' cross motions for summary judgment.

II. Legal Standard

When consideration a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inference from the record are drawn in favor of the non-movant. Id. At 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which he bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F. 2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). The non-moving party may not rest on his pleadings but must come forward with evidence from which a reasonable jury could return a verdict in his favor. Anderson, 479 U.S. at 248; Williams v. Borough of West Chester, 891 F. 2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

While the parties clearly differ on the conclusions to be drawn, the pertinent facts are essentially uncontroverted. They are as follows.

Plaintiff was a postal worker from 1988 to October 1991. Plaintiff is now the president and sole shareholder of Street Sounds Recording and Production Co., Inc. ("Street Sounds"). In 1991, while employed by the U.S. Postal Service, plaintiff was the subject of an internal sexual harassment investigation. As a result, he developed a stress-related condition which was originally diagnosed as an "adjustment disorder with mixed emotional features." The diagnosis was later changed to "generalized anxiety disorder." plaintiff's condition involves "difficulty concentrating, mistrust of all authority figures and feelings of being on edge," as well as a "greatly decreased sex drive" and "sleeping difficulties." Plaintiff was "not able to work in any structured work situation" resembling the postal service. Plaintiff has received workmen's compensation from the U.S. Department of Labor since 1993.

Defendant Pennsylvania Minority Business Development Authority ("PMBDA" is an agency of the Commonwealth of Pennsylvania created for the purpose of providing low-interest loans to minority-owned and operated businesses. At all times relevant to this action, defendant Isabelle Smith was the PMBDA executive director and defendant Eugene Hess was a PMBDA economic development analyst.

By early 1995, the PMBDA had become the subject of considerable criticism because of the high delinquency and default rates of its loans. In January 1995, the Pennsylvania House of Representatives passed a resolution that no new funds would be appropriated by the House for the PMBDA

until a comprehensive audit was conducted. See House Resolution 25 (1995). The resulting audit was completed in May 1995. The audit report criticized the PMBDA, inter alia, for lack of controls over loan documentation resulting in "potential losses due to loans being approved without merit or inadequate collateral coverage."

On April 24, 1995 plaintiff applied to the PMBDA for a $60,000 business loan for Street Sounds. He presented a business plan according to which the funds would be used to record and to market rhythm and blues and rap music. Although Street Sounds was incorporated in 1991, the proposal was pitched as a start-up plan because the business had been relatively inactive due to plaintiff's lack of capital and disability.

Plaintiff stated in his application that he was on disability status from the U.S. Postal Service and was receiving monthly disability checks. In a letter of May 18, 1995, plaintiff noted that he could use these payments as working capital and to service the loan.

Plaintiff's initial contact as the PMBDA was Kelbin Carolina, then the PMBDA regional representative for Philadelphia. In November 1995 Mr. Carolina's position was terminated. After Mr. Carolina's departure, Mr. Hess took over as plaintiff's contact. Mr. Carolina had formed a positive opinion of plaintiff and his business proposal. When Mr. Carolina presented the application to Ms. Smith, she noted plaintiff's receipt of disability payments and expressed a concern about "whether (plaintiff) could manage the business" for which the loan was sought as required by PMBDA regulations. She also expressed skepticism about the merits of the business proposal. Mr. Carolina told Ms. Smith that he believed that plaintiff was competent and able to manage Street Sounds.

Ms. Smith also objected to plaintiff's plan to run the business out of his residence and required that some business address be established. Plaintiff agreed to designate 2318 Rosemarie Avenue, where he had previously been residing, as Street Sound's business address.

Plaintiff's application was presented to the Loan Evaluation Committee on July 13, 1995. The committee voted to recommend approval of plaintiff's loan to the PMBDA Board of Directors. The Board met on July 27, 1995 and voted to approve the loan, subject to the fulfillment by Street Sounds of certain conditions. The PMBDA notified defendant by commitment letter dated August 18, 1995 of its approval and of the conditions required of Street Sounds.

In accordance with PMBDA standard procedures, plaintiff was to provide at closing an "equity injection" equal to 25% of the total business project costs of $80,000 and to secure the loan with sound mortgages on his real property at 6013 Magnolia Street and 450 East Walnut Lane. The commitment letter also restricted the use of the loan funds to video production and audio and video promotion instead of unrestricted working capital. The letter notified plaintiff that the commitment would expire on November 30, 1995. In December, plaintiff requested and obtained a ninety-day extension of the loan commitment to February 28, 1996.

A closing was scheduled for April 3, 1996. The closing did not go through because plaintiff had not obtained mortgage waivers on the properties at 6013 Magnolia Street and 450 E. Walnut Lane. Plaintiff also stated that he wished to change the terms of the loan agreement.

On April 4, 1996 plaintiff requested that Street Sounds be allowed to use $20,000 of the loan proceeds as unrestricted working capital and that Street Sound's prior expenditures be credited towards satisfaction of the $20,000

equity injection requirement. The PMBDA agreed to amend the terms of the proposed loan to allow $10,000 of the proceeds to be used as unrestricted working capital and to credit Street Sounds for any purchases made after July 1, 1995, the month the application had been approved. On April 22, 1996, plaintiff renewed his request to allocate $20,000 of the proceeds for unrestricted working capital. This response was not approved.

About one month later, plaintiff obtained a mortgage waiver on the 450 E. Walnut Lane property. By letter of April 26, 1996, Ms. Smith informed plaintiff that the PMBDA was concerned that he had still failed to obtain a mortgage waiver on the property at 6013 Magnolia Street and that he had not provided the equity injection in cash or receipts for purchases.

Plaintiff responded by letter of July 16, 1999 that he wished to substitute a newly acquired property at 6009 Magnolia Street. Plaintiff also submitted canceled checks showing expenditures by Street Sounds after July 1, 1995 of almost $11,000 for rent and utilities on the Rosemarie Avenue Apartment and a copy of corporate minutes stating: "on December 18, 1995 Street Sounds Recording and Production Co., Inc. agreed to purchase equipment and convert loans from stockholders into paid in capital. Equipment purchased from stockholders on December 18, 1995 totaled $11,731.00." No receipts were provided for the equipment.

On August 12, 1996 plaintiff met with Mr. Hess to discuss the unresolved issues regarding his loan application. Mr. Hess informed plaintiff that the PMBDA would not accept the corporate minutes as evidence that he had in fact provided $11,000 worth of equipment and that the PMBDA was concerned about the collateral value of the 6009

Magnolia Street property and lack of success of Street Sounds over the previous five years.

According to the documentation submitted by plaintiff the property at 6009 Magnolia Street was appraised at $42,000 only nine days after he purchased it for $15,000 with a $10,000 mortgage. Plaintiff's explanation was that he purchased the property from a friend at substantially below market value and made $5,000 worth of renovations. The PMBDA required further proof of the claimed market value of the property. None was forthcoming.

On August 28, 1996, plaintiff submitted a receipt made out and signed by himself showing the transfer of equipment valued at $11,731 to Street Sounds in December 1995. No receipts of the underlying purchases or evidence of the equipment's market value were provided. Defendants rejected this documentation as evidence of capital contribution for the equity injection requirement.

By letter of September 9, 1996, Ms. Smith notified plaintiff that the PMBDA intended to rescind the loan commitment because he had not made the required equity injection, did not provide sufficient collateral and had not presented sufficient evidence of likelihood that he could meet the projected debt service. The PMBDA declined to accept copies of bank statements from April 1995 showing $27,000 as proof of plaintiff's assets and ability to make a capital contribution in September 1996. On September 24, 1996, plaintiff requested the PMBDA to reconsider and stated that he had provided "near total collateral" and that a capital contribution was "still possible." No new evidence of collateral or of plaintiff's capacity to make the equity injection was provided. On September 26, 1996, the PMBDA Board voted to rescind the commitment to lend $60,000 to Street Sounds and so advised plaintiff by correspondence of that date.

IV. Discussion

A. The ADA Claim

To establish a violation of Title II of the ADA a plaintiff must show that he was a qualified individual with a disability, that he was denied the benefit of a public program or service or otherwise discriminated against, and the discrimination or denial of the benefit was due to his disability. See 42 U.S.C. § 12132; Weinreich v. Los Angeles County Metropolitan Transp. Authority, 114 F. 3d 976 (9th Cir. 1997), cert. denied 118 S. Ct. 423; Adelman v. Dunmire, 1997 WL 164240, at 1 (E.D. Pa. March 28, 1997), aff'd, 149 F. 3d 1163 (3d Cir. 1998). The parties do not dispute that plaintiff was denied the benefit of the loan program provided by the PMBDA. Defendants argue that plaintiff was not disabled, was not qualified and was not in any event denied a loan for any reason related to his claimed disability.

For the purposes of the ADA, "disability" means: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102. Jerry Cimmet, a psychologist, states in his report that plaintiff has suffered from "generalized anxiety" since at least November 1993. Defendants challenge that this impairment limits a major life activity.

Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" Taylor v. Phoenixville School Dist. 174 F. 3d 142, 152 (3 Cir. 1999) (quoting 29 C.F.R. § 1630.2(I)) Plaintiff contends that his generalized anxiety disorder causes him to be substantially

impaired in the major life activities of working, interacting with people, sleeping, concentrating and functioning sexually.

When considering impairments of activities other than working, the inquiry is directed at comparing the plaintiff's ability compared with the "average person in the general population." Mondzelewski v. Pathmark Stores, Inc., 162 F. 3d 778, 783 (3d Cir. 1998). An individual is substantially limited in working where there is "a significant restriction in the ability 'to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skill and abilities.'" Mondzelewski, 162 F. 3d at 783 (quoting 29 C.F.R. § 1630.2(j)(3)(I). Dr. Cimmet's conclusion that plaintiff is unable to work in a structured work situation is sufficient to show that he is restricted from performing most of the jobs for which he would otherwise be qualified.

Defendants assert that even if plaintiff was disabled at the time of his application, he was not a qualified individual with a disability. A "qualified individual with a disability" is "an individual with a disability who, with, or without reasonable modifications to rules, policies, or practices, . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services." See 42 U.S.C. §12131(2). "Essential eligibility requirements" are those reasonably necessary to accomplish the purpose of the program. See Pottggen v. Missouri State High School Activities Ass'n, 40 F. 3d 926, 931 (8th Cir. 1994); Bowers v. National Collegiate Athletic Ass'n, 974 F. Supp. 459, 466 (D.N.J. 1997).

Defendants argue plaintiff did not meet the eligibility requirements specified in the commitment letter and that those requirements were essential to the loan program. It is uncontroverted that the scheduled closing fell through

because plaintiff had not obtained the mortgage waivers. Defendants assert that the loan was ultimately rescinded because plaintiff never showed the ability to satisfy the terms of the commitment letter.

Plaintiff states that he satisfied the collateral requirement by substituting the 6009 Magnolia Street property for the 6013 Magnolia Street property. Defendants rejected the substitution due to their concern that plaintiff was substantially overstating this equity in the 6009 Magnolia Street property. Any prudent lender would be skeptical about a claim that one had sold his property, even to a friend, for $22,000 less than and barely 40% of the market price. Defendants' desire for further proof of the claimed market value was consistent with sound lending policies essential to the operation of the PMBDA program.

Defendants contend plaintiff also failed to present proof that he was able to make the required $20,000 equity injection. Plaintiff states that he presented receipts showing purchases by Street Sounds of nearly $22,000. Over half of this amount, however, consisted of a purported transfer of $11,731 worth of equipment from plaintiff to Street Sounds for which plaintiff did not have dated receipts or comparable evidence of market value. Depreciation schedules he provided indicated the equipment was old and had been largely depreciated.

Plaintiff asserts that he presented proof of the capacity to make the $20,000 equity injection in cash. He refers to the copies of 1995 bank statements. In accordance with PMBDA policy, this was rejected as too old to prove plaintiff's current capacity to make the capital contribution. Mr. Carolina's uncontroverted deposition testimony is that the policy of the PMBDA was not to rely on old bank statements but to require current verification of the ability to make a cash equity injection. It is uncontroverted that

plaintiff did not submit updated records of bank deposits. With his statement of September 24, 1996 that a "cash injection [was] still possible," plaintiff provided no supporting evidence or explanation of when or how such an injection could be made. Plaintiff has presented no evidence that he demonstrated to defendants an ability to meet the equity injection requirement.

Defendants assert with force that collateral and equity injection were essential eligibility requirements. PMBDA regulations require that any loan recipient "pledge and maintain real and personal property as collateral, in the form and amount necessary to reasonably assure payment of the loan in the event of default or bankruptcy." See 12 Pa. Code § 81.112(a)(3). "At least 25% of the eligible project costs shall be contributed in cash from sources other than the authority." See 12 Pa. Code § 81.112(a)(3). These requirements clearly are designed to ensure the credit worthiness of borrowers, to protect public funds, to avoid defaults and to help ensure the availability of funds for future qualified applicants.

Plaintiff points to a statement in Mr. Carolina's affidavit that some loans were provided without collateral. He overlooks, however, Mr. Carolina's explanation that such loans had been approved only where the borrower's "total assets exceeded the loan amount." There is no evidence that plaintiff presented proof of assets exceeding the loan amount. There is also no evidence that any such loan was made after the General assembly threatened to terminate funding because of the default rate. Plaintiff also points to the report of the audit of the PMBDA, which notes that several loan files contained no documentation of collateral. The report did not state, however, that the loans had been approved without sufficient collateral. Moreover, it is nonsensical to suggest that the PMBDA was obliged to continue to engage

in the kind of conduct with jeopardized its funding and resulted in the highly critical audit report.

Plaintiff points to a statement in PMBDA's Operational Manual which provides: "[t]hat portion of the 25% equity contribution spent prior to submitting the application can be considered on a case-by-case basis, given the approval of the Executive Director." Plaintiff presents no evidence that he requested such approval or could have demonstrated sufficient prior expenditures to satisfy the requirement. Plaintiff presented no evidence to the agency to substantiate the value of equipment for which he sought a credit. Moreover, the Operational Manual also provides that as of July 7, 1994, the equity injection "must be from business savings (investment account) or cash equity (personal savings account), "which would preclude satisfaction of the equity injection requirement by prior expenditures.

The ADA requires that a reasonable accommodation be made for an individual's disability, so that he is not disadvantaged by reason of the disability, so that he is not disadvantaged by reason of the disability. It does not require that an individual must be accommodated because he happens to have a disability. Plaintiff does not contend that he failed to meet the terms of the commitment letter for reasons related to his anxiety or that he could have satisfied the essential eligibility requirements for a PMBDA loan if the affects of his disability were accommodated. The PMBDA operates a loan program and not a grant program. It is clear that giving money to applicants without adequate collateral, capital or equity would fundamentally alter the program and impose an undue burden from increased defaults and depletion of funds for credit worthy borrowers.

Even if the collateral and equity injection requirements were non-essential, the denial of plaintiff's loan

request for the reason that he failed to meet the terms of the commitment letter was not disability discrimination. A public agency does not engage in disability discrimination. A public agency does not engage in disability discrimination when it denies benefits to a disabled person who does not meet conditions of the program unrelated to the applicant's disability. See Bowen v. American Hosp. Ass'n, 476 U.S. 610, 630 (1986) (no discrimination where hospital refused to treat child who had not satisfied hospital requirement of parental consent); Sandison v. Michigan High School Athletic Ass'n, Inc., 64 F. 3d 1026, 1030 (6th Cir. 1995) (no discrimination where disabled student was denied participation in athletic program because of age); Lucero v. Hart, 915 F. 2d 1367, 1372 (9th Cir. 1990) (employee with emotional disability fired because she could not meet typing requirement). Plaintiff has presented no evidence that his failure to meet the collateral and equity injection requirements was occasioned by his disability.

Plaintiff contends that the PMBDA discrimination against him by imposing stricter requirements on Street Sounds than it did on other applicants. He points to the statement of Mr. Carolina that the PMBDA had funded home-based businesses. Nowhere in the record, however, is any information provided regarding the nature of those home-based businesses. It is clear that some businesses can more successfully be operated out of the home than can others. There is no evidence that these other businesses were similar to Street Sounds. Moreover, the requirement that Street Sounds have a business address was not related to the denial of the loan.

Plaintiff also contends that he should have been given more time to fulfill the loan requirements. By letter of April 12, 1996, Mr. Hess warned plaintiff of the importance of timely completion of the loan requirements. Mr. Hess explained to plaintiff defendants' concerns at their August

12, 1996 meeting. It is uncontroverted that Ms. Smith warned plaintiff again of the problems in her letter of September 9, 1996. Plaintiff's response on September 24, 1996 did not demonstrate that even with still more time he had the ability to satisfy the terms for a loan.

Plaintiff states that other loans had been approved after a longer delay, relying on the PMBDA audit report. He fails to note, however, that the report was very critical of the length of the process and that the agency was encouraged to take steps to ameliorate the problem. Also, there is no indication that these loans involved applicants who failed to demonstrate the capacity to meet the requirements for a loan. Moreover, it is uncontroverted that the loan commitment was rescinded only when after more than five months of discussions with plaintiff subsequent to the failure of the scheduled closing and well after the expiration of the extension of the loan commitment, plaintiff was still unable to demonstrate an ability to satisfy the terms. From the evidence presented, one could not reasonably conclude that defendants discriminated against plaintiff by not giving him sufficient time to satisfy the terms of the commitment letter.

Plaintiff finally contends that defendants demonstrated bias by questioning him about his disability. That defendants questioned him about the extent or affect of his disability is not evidence of discrimination. Plaintiff himself informed defendants of his disability and stated it was a reason his business had been inactive in the past. Ms. Smith and any others asked to approve plaintiff's loan application had a legitimate interest in determining whether plaintiff's disability would prevent him from managing and working full-time in the future at Street Sounds as required by PMBDA regulations. See 12 Pa. Code § 81.111(a)(6) & (7).

Once plaintiff assured the PMBDA that he could and would fulfill the management and full-time work requirements, the loan application was approved and indeed the loan commitment was even extended. Defendants worked with plaintiff for over sixteen months in an effort to grant him a loan. The loan approval was rescinded only after plaintiff failed at the scheduled closing, during the extended commitment period and thereafter to satisfy the terms to which he agreed and on which the loan was approved.

From the record presented, one simply cannot reasonably find that defendants' reasons for ultimately denying the loan were untrue or that the decision was motivated by or related to plaintiff's general anxiety condition.

B. Rehabilitation Act Claim

The Rehabilitation Act applies only to programs receiving federal assistance. See 29 U.S.C. § 794(a); Shiring v. Runyon, 90 F. 3d 827, 830 (3d Cir. 1996). It is uncontroverted that the PMBDA does not receive federal funds.

V. Conclusion

Plaintiff has not sustained his claims. One cannot reasonably find from the competent evidence of record that defendants' stated reasons for denying plaintiff a loan were untruthful or that they discriminated against him because of his disability. There is no evidence that plaintiff's disability is what prevented his qualification for the benefit in question.

Accordingly, defendants' motion will be granted. An appropriate order will be entered.

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 99-1644

NORMAN K. JONES

Apellant

v.

THE PENNSYLVANIA MINORITY BUSINESS DEVELOPMENT AUTHORITY; ISABELLE SMITH; EUGENE HESS

Appellees

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and BRIGHT* Circuit Judges

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SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT

Circuit Judge

DATED: October 31, 2000

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*The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, limited to panel vote only.